Imej Muhibah Sdn Bhd v Pintar Asiamas Sdn Bhd (in liquidation) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(1M)(NCVC)-2317–11 OF 2017
VERNON ONG, HARMINDAR SINGH AND NOR BEE ARIFFIN JJCA
29 APRIL 2019

Civil Procedure — Jurisdiction — Courts of coordinate jurisdiction — High Court judge set aside decision made by another court of coordinate jurisdiction — Whether High Court judge acted in excess of jurisdiction — Whether there were exceptional circumstances — Rules of Court 2012 O 33

This was an appeal against the decision of the High Court which struck out the appellant's claim, set aside an injunction order and the leave order obtained from the Taping High Court sitting as the winding up court. The appellant and the first respondent had entered into a joint venture agreement ('JVA') to develop a piece of land into a housing estate (the said land). A power of attorney ('PA') was executed by the first respondent in favour of the respondent. Subsequently, the first respondent had vide a letter which was signed by the second respondent as director of the first respondent, unilaterally terminated the JVA to which the appellant objected on the basis that it was able and willing to perform its obligations to develop the said land. Prior to the unilateral termination, it was asserted that the first respondent had fraudulently transferred the said land to the third respondent vide a sale and purchase agreement ('SPA'). It was the appellant's position that this transfer was a clear breach of cl 20 of the JVA. However before the appellant could file its writ, the first respondent was wound up, the appellant then filed for leave to proceed against the first respondent under liquidation pursuant to s 226(2) of the Companies Act 1965 which was granted by the Taiping High Court which led to the appellant filing the instant claim. The appellant in the claim challenged the registration and/or transfer of the said land in the third respondent's name and sought an order that the said registration and/or transfer be set aside. An injunction order was granted which was confirmed by the Court of Appeal. As the trial was about to commence at the High Court, a preliminary objection was raised by the second and third respondents. The contention was that leave to commence proceedings against the first respondent was improperly obtained that the affidavit in support was affirmed by an undischarged bankrupt which he had failed to disclose. The High Court judge had dismissed the writ and statement of claim on the preliminary objection raised. The main issue to be determined in this appeal was whether the learned judge had acted in excess of his jurisdiction when he decided that the order of the Taiping High Court granting leave to the appellant to proceed with the claim was bad in law.

Held:

(1) A court should not willy-nilly set aside an order made by another court of co-ordinate jurisdiction. The order made must be respected and can only be set aside in exceptional circumstances as set out in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 ('Badiaddin'). If it does not come within the exceptions as set out in *Badiaddin*, the general rule must apply in that an aggrieved party must appeal to a higher court (see para 21).

(2) In the present case, the leave order did not fall within the exceptions. There was no question of the order being made without jurisdiction or being made in contravention of any statute or whether it was made in breach of the rules of natural justice. The only criticism was that the affidavit in support was defective as it was affirmed by a bankrupt who had not disclosed his status. The correct approach would have been to apply before the same winding up court and have the leave order set aside. It ought to be recalled that no objection to the leave application was taken by the liquidator of the first respondent (see para 22).

(3) The learned judge had no jurisdiction to consider the issue raised and ought to have declined to act under O 33 of the Rules of Court 2012. There was no material for the learned judge to act upon except for pleadings which did not contain any relevant material on the issue raised. Instead the learned judge appeared to rely on witness statements filed which had yet to be received in evidence. It was most inappropriate for the learned judge to have done so (see para 25).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan mahkamah tinggi yang membatalkan tuntutan perayu, mengetepikan satu perintah injunksi dan perintah izin yang diperoleh daripada mahkamah tinggi taiping yang bersidang sebagai mahkamah penggulungan. Perayu dan responden pertama telah memasuki satu perjanjian usahasama ('PU') untuk memajukan satu bidang tanah kepada kawasan perumahan ('tanah tersebut'). Surat kuasa wakil ('PA') telah dilaksanakan oleh responden yang memihak kepada responden. Kemudiannya, responden pertama telah, melalui satu surat yang ditandatangani responden kedua sebagai pengarah responden pertama, secara sehala menamatkan PU tersebut yang mana perayu telah membantah atas alasan bahawa perayu masih berniat dan mampu untuk melaksanakan tanggungjawabnya untuk memajukan tanah tersebut. Sebelum ianya ditamatkan secara sehala, ianya dikatakan responden pertama telah secara salah memindahkan tanah tersebut kepada responden ketiga melalui satu perjanjian jual beli ('PJB'). Adalah menjadi kedudukan perayu bahawa pemindahan ini merupakan satu pelanggaran klausa 20 PU. Namun, sebelum perayu boleh memfailkan writnya, responden pertama telah digulungkan, perayu

kemudiannya memfailkan permohonan untuk kebenaran untuk meneruskan terhadap responden pertama dibawah pembubaran selaras dengan s 226(2) Akta Syarikat 1965 yang dibenarkan oleh Mahkamah Tinggi Taiping yang telah membawa kepada perayu memfailkan tuntutan ini. Perayu dalam tuntutan ini mencabar pendaftaran dan/atau pemindahan untuk tanah tersebut kepada nama responden ketiga dan memohon satu perintah bahawa pendaftaran dan/atau pemindahan tersebut diketepikan. Satu perintah injunksi diberikan dan disahkan oleh Mahkamah Rayuan. Memandangkan perbicaraan akan bermula di Mahkamah Tinggi, satu bantahan awal telah dibangkitkan oleh responden kedua dan ketiga. Cabarannya adalah bahawa izin untuk memulakan prosiding terhadap responden pertama telah diperoleh secara salah atas sebab afidavit sokongan diikrarkan oleh seorang muflis yang belum dibebaskan yang mana dia gagal untuk memaklumkan. Mahkamah tinggi telah membatalkan writ dan penyataan tuntutan berdasarkan bantahan awal yang dibangkitkan. Isu utama untuk ditentukan dalam rayuan ini adalah sama ada hakim terpelajar telah bertindak melebihi bidang kuasanya apabila beliau memutuskan bahawa perintah Mahkamah Tinggi Taiping yang membenarkan izin kepada perayu untuk meneruskan dengan tuntutannya adalah salah di sisi undang-undang.

Diputuskan:

(1) Mahkamah tidak seharusnya dengan sewenang-wenangnya mengetepikan satu perintah yang dibuat oleh mahkamah lain yang bidangkuasanya sama. Perintah yang dibuat mesti dihormati dan ianya hanya boleh diketepikan dalam keadaan luar biasa sepertimana dinyatakan dalam *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysia Finance Bhd* [1998] 1 MLJ 393 ('Badiaddin'). Sekiranya ianya tidak merupakan sebahagian daripada pengecualian yang dinyatakan dalam *Badiaddin*, peraturan am harus terpakai yang mana pihak yang terkilan harus merayu kepada mahkamah yang lebih tinggi (lihat perenggan 21).

(2) Dalam kes ini, perintah izin tidak terjumlah dalam pengecualian tersebut. Tiada persoalan sama ada perintah yang dibuat tanpa bidang kuasa. Atau bertentangan dengan apa-apa statut atau sama ada ianya melanggar peraturan keadilan asasi. Satu-satunya kritikan adalah bahawa afidavit sokongan tersebut cacat kerana ianya diikrarkan oleh seorang yang muflis tidak memaklumkan akan statusnya. Pendekatan yang betul adalah untuk memohon dihadapan mahkamah pengulunggan yang sama dan memohon agar perintah izin itu diketepikan. Ianya perlu diingati bahawa tiada bantahan berkenaan dengan permohonan izin tersebut diambil oleh penyelesai responden pertama (lihat perenggan 22).

(3) Hakim terpelajar tiada bidang kuasa untuk menimbangkan isu yang yang dibangkitkan dan seharusnya menolak untuk bertindak di bawah k 33 Kaedah-Kaedah Mahkamah 2012. Tiada bahan untuk hakim

terpelajar bertindak atas kecuali mana pliding yang tidak mengandungi apa-apa bahan yang relevan atas isu yang dibangkitkan. Sebaliknya, hakim terpelajar kelihatan bergantung kepada penyataan saksi yang difailkan yang masih belum diterima sebagai keterangan. Adalah tidak patut untuk hakim terpelajar berbuat sedemikian (lihat perenggan 25).]

Notes

For cases on courts of coordinate jurisdiciton, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6074–6076.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Ng King Chong & Anor v Ooi Kim Geik & Ors [2019] 2 MLJ 398; [2019] 2 CLJ 246, CA (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967)
Companies Act 1965 ss 38(d), (e), 226(2)
Rules of Court 2012 O 33, O 33 rr 2, 5

Appeal from: Civil Suit No 22NCVC-134–12 of 2015 (High Court, Ipoh)

Ranjan Chandran (Chandni Anantha Krishnan with him) (Hakem Arabi & Assoc) for the appellant.
Pamela Ephraim (Susielan & Assoc) for the first respondent.
Cheah Sau Voon (KH Wong, Chin & Cheah) for the second respondent.
Choy Kam Lee (KL Choy & Co) for the third respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] This appeal emanates from the decision of the Ipoh High Court given on 10 October 2017. The High Court had struck out the plaintiff/appellant's claim, set aside an injunction order dated 30 August 2016 and set aside the leave order dated 29 January 2015 obtained from the Taiping High Court sitting as the winding-up court.

[2] Aggrieved with the orders made, the plaintiff/appellant filed the instant appeal. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

BRIEF FACTS

[3] The salient facts giving rise to the civil suit can be stated as follows. The appellant and the first respondent had entered into a joint venture agreement dated 1 August 2012 ('JVA') to jointly develop a piece of land known as Lot 40481, Mukim Hulu Kinta, Daerah Kinta ('the said land') into a housing estate. A power of attorney (PA) dated 1 August 2012 was executed by the first respondent in favour of the appellant.

[4] By a letter dated 17 March 2014, the first respondent unilaterally terminated the JVA. The appellant objected to the termination on the basis that it was able and willing to perform its obligations as covenanted to develop the land. The said termination letter of the first respondent was signed by the second respondent purportedly as director of the first respondent. It was contended that he had already resigned on 22 January 2014 and had therefore no authority to sign the letter at the material time.

[5] Prior to the unilateral termination of the JVA, the first respondent, it was asserted, had fraudulently transferred the said land to the third respondent on 9 December 2013 by a sale and purchase agreement (SPA) executed for a consideration sum of RM1,834,900. The appellant's position was that this transfer was in clear breach of cl 20 of the JVA that prohibited any sale, transfer, conveyance of the land when the JVA was still subsisting.

[6] Before the plaintiff could file its writ, first respondent was wound up on 17 October 2014. The appellant then applied for leave to proceed against the first respondent under liquidation pursuant to s 226(2) of the Companies Act 1965. Leave was granted by the Taiping High Court on 29 January 2014.

[7] The appellant then filed the instant claim. The appellant, in the claim, challenged the registration and/or transfer of the said land in the third respondent's name and sought an order that the said registration and/or transfer be set aside. An injunction order dated 30 August 2016 was granted by the High Court which was confirmed by the Court of Appeal.

AT THE HIGH COURT

[8] At the High Court, as the trial was about to commence, a preliminary objection was raised by the second and third respondents. The contention was that leave to commence proceedings against the first respondent was improperly obtained. It was argued that in the application for leave before the Taiping High Court, an affidavit in support was affirmed by one Sukhdev Singh s/o Arjan Singh ('Sukhdev Singh') who was an undischarged bankrupt. Except for the fact that he was the manager of the appellant, the deponent had

A not disclosed his status as a bankrupt in the affidavit. It was therefore submitted that since the affidavit in support to obtain leave was in breach of the law, it was void and the appellant's leave was obtained unlawfully.

B **[9]** The learned judge considered that he had jurisdiction to hear the preliminary objection under O 33 r 5 of the Rules of Court 2012 ('the ROC 2012') without any formal application. After hearing submissions, the learned judge made the orders which are now the subject-matter of the instant appeal. The following is how the learned judge assessed the issue:

C [25] Berdasarkan kepada fakta yang tidak dipertikaikan dan peruntukan undang-undang yang dinyatakan tersebut, adalah didapati bahawa perintah kebenaran yang diperoleh plaintif bagi membawa tindakan terhadap defendan pertarna telah dibuat di luar aturan, tidak sah dan batal. Walau bagai rnana pun, mahkamah ini sedar bahawa prosiding bantahan awalan yang dibangkitkan
D peguam-peguam defendan keenarn dan ketujuh bukanlah forum yang sesuai untuk mengetepikan perintah kebenaran yang dikeluarkan Mahkamah Tinggi Taiping. Satu perintah yang telah sempurna dikeluarkan mahkarnah yang kompeten hanya boleh diketepikan melalui satu tindakan berasingan bagi tujuan tersebut. Lihat keputusan Mahkamah Persekutuan di dalam kes *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 dan *Serac Asia Sdn Bhd v*
E *Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1.

[26] Namun begitu, mahkamah ini tidak boleh menutup sebelah mata dengan mernbiarkan sahaja perintah kebenaran yang diperoleh secara luar aturan digunakan di dalam prosiding di hadapannya. Dengan itu, rnahkamah
F rnenggunakan kuasa budi yang ada di bawah A 33 k 2 untuk mendengar bantahan awalan peguam-peguam defendan keenam dan ketujuh dengan mengarahkan pihak-pihak mengemukakan hujahan serta seterusnya membuat keputusan di atas bantahan awalan tersebut.

G [27] Setelah dibuat penelitian dan pertimbangan ke atas bantahan awalan, persoalan undang-undang yang dibangkitkan peguam-peguam defendan keenam dan ketujuh melalui bantahan awalan dijawab secara positif. Tindakan plaintif terhadap defendan pertama tidak dapat dipertahankan. Oleh kerana tindakan plaintif terhadap defendan-defendan yang lain bergantung kepada perjanjian yang dimasuki di antara plaintif dan defendan pertama, maka tuntutan plaintif terhadap
H mereka juga tidak boleh dipertahankan.

[28] Setelah ternyata kepada mahkamah bahawa keputusan mengenai bantahan awalan yang dibangkitkan peguam-peguam defendan keenam dan ketujuh dapat menyelesaikan atau pun dapat memuktamadkan keseluruhan tindakan dan menjadikan perbicaraan penuh kausa tindakan ini tidak perlu, mahkamah boleh
I membuat keputusan untuk membatalkan writ saman dan pernyataan tuntutan plaintif dengan kuasa yang diperuntukkan di bawah A 33 k 5 KKM 2012 ...

THE INSTANT APPEAL

[10] It would appear from the grounds of decision of the learned judge as set out above that the entire claim of the appellant was struck out solely on one ground. And that one ground was that the manager of the appellant, the same Sukhdev Singh, had failed to disclose that he was an undischarged bankrupt.

[11] So before us, although several issues were raised in the written submissions, the main issue canvassed was whether the learned judge had acted in excess of his jurisdiction when he decided that the order of the Taiping High Court granting leave to the appellant to proceed with the claim was bad in law. We agreed that this issue was pivotal to this appeal.

[12] On this issue, the second and third respondents argued that since Mr Sukhdev Singh's managerial position and his affirmation in the affidavit in the application for leave to institute the present proceedings was in contravention of the Bankruptcy Act 1967 and ss 38(d) and (e) of the Companies Act 1965, the order granting such leave was defective and the learned judge was empowered under O 33 rr 2 and 5 of the ROC 2012 to consider and strike out the suit accordingly.

[13] The first respondent on the other hand supported the appellant's position and argued that the appeal should be allowed. The first respondent was a company in liquidation and all matters regarding the first respondent was in the hands of the appointed liquidator. The first respondent, through the liquidator, submitted that the crux of the dispute was the said land which was the subject-matter of the JVA between the first respondent and the appellant.

[14] The first respondent contended that there was non-accountability of the proceeds of sale of the said land amounting to the sum of RM1,834,900 which monies were not reflected in the bank statements from 2013–2014, the annual report for the year 2014 and the statement of affairs lodged by the ex-directors of the first respondent after its winding up.

[15] It was further contended that the sale of the said land was done below market value and the unilateral termination of the JVA was done fraudulently. The liquidator was duty bound to preserve the only asset of the first respondent for the benefit of its creditors. It was submitted that the claim ought to be reinstated and the issues resolved in a full trial as there were serious issues to be tried.

[16] The appellant in turn argued that although the affidavit affirmed by Mr Sukhdev Singh did not disclose his bankruptcy, the learned judge was wrong to set aside the order of a court of co-ordinate jurisdiction. It was argued

A that although the learned judge was mindful of the principle in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 ('Badiaddin'), he had erroneously set aside the leave order based on the exception to the general rule.

B **[17]** So the issue before us is quite straight forward. It is whether the *Badiaddin* principle was correctly applied by the learned judge. The principle was set out by the Federal Court in *Badiaddin*, and is now commonly referred to as the *Badiaddin* principle. The Federal Court there, through the judgment of Mohd Azmi FCJ, set out the law as follows at p 409:

C

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of
> D illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... where a person affected
> E by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.

F **[18]** And His Lordship continued his pronouncement (at p 409):

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention
> G should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect
> H is of such serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

I **[19]** The *Badiaddin* principle has been applied in many cases. The jurisprudence in relation to this principle was set out in succinct fashion by this court in *Ng King Chong & Anor v Ooi Kim Geik & Ors* [2019] 2 MLJ 398; [2019] 2 CLJ 246 as follows (at p 410 (MLJ); p 259 (CLJ)):

> The principles gained from the case authorities can therefore be expressed as

follows. As a general rule, an aggrieved party who is dissatisfied with a final order of a court of unlimited jurisdiction must appeal to a higher court. The exception to this rule is that where an order is null and void on the grounds of breach of natural justice, illegality or lack of jurisdiction, such court will have the power under its inherent jurisdiction to set aside its own order. Where an order is a nullity, it can be successfully challenged in collateral proceedings.

[20] Reverting to the instant appeal, and after careful consideration, we came to the view that the learned judge had acted in excess of his jurisdiction in that he had erroneously applied the exception as stated in *Badiaddin*. It was plain to us that the learned judge fell into error for a number of reasons.

[21] Firstly, we were of the view that a court should not willy-nilly set aside an order made by another court of co-ordinate jurisdiction. The order made must be respected and can only be set aside in exceptional circumstances as set out in the *Badiaddin* case. If it does not come within the exceptions as set out in *Badiaddin*, the general rule must apply in that an aggrieved party must appeal to a higher court.

[22] In the present case, we did not think that the leave order was such as to fall within the exceptions. There was no question of the order being made without jurisdiction or being made in contravention of any statute or whether it was made in breach of the rules of natural justice. The only criticism is that the affidavit in support was defective as it was affirmed by a bankrupt who had not disclosed his status. In our view, the correct approach would have been to apply before the same winding up court and have the leave order set aside. It must be recalled, and this is significant, that no objection to the leave application was taken by the liquidator of the first respondent.

[23] Secondly, the second and third respondents were not parties in the winding up proceedings. The leave order only concerned the first respondent in liquidation. It is doubtful whether the second and third respondents could be considered as parties aggrieved by the leave order. As such, they would not even have the locus to set aside the leave order if they had applied to the winding up court. As mentioned earlier, the first respondent had no objection to the leave order. Their interest is for the matter to be fully litigated so that the issue of fraud can be decided by the court.

[24] Finally, we noted that the claim of the parties in the High Court below was certainly not about whether the leave order ought to be set aside. There was no relief for the leave order to be set aside. It was only when the trial was about to commence that the second and third respondents raised the issue of whether leave was properly obtained.

[25] In our respectful view, the learned judge had no jurisdiction to consider the issue raised and ought to have declined to act under O 33 of the ROC 2012. After all, the application was made on the eve of the trial and no formal application was even filed. Importantly, there was no material for the learned judge to act upon except for the pleadings which did not contain any relevant material on the issue raised. Instead, the learned judge appeared to rely on witness statements filed which had yet to be received into evidence. In our view, it was most inappropriate for the learned judge to have done so.

CONCLUSION

[26] In the circumstances, and for the reasons we have given, we were persuaded that the learned judge had fallen into grave error in resolving the dispute by resort to O 33 of the ROC 2012 when he had no jurisdiction to do so. The appeal was accordingly allowed and the order of the High Court set aside. We also ordered the second and third respondents to each pay costs of RM20,000 here and below to the appellant. The action was remitted back to the High Court for trial. Deposit to be refunded.

Order accordingly.

Reported by Izzat Fauzan